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NO. 80-215

In the Supreme Court of the United States

OCTOBER TERM, 1980

EDWIN W. EDWARDS, et al.,
Appellants,

versus

SERVICE MACHINE & SHIPBUILDING CORPORATION, INC., et al.,
Appellees.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

APPELLEES' MOTION TO AFFIRM

M. DAVID GELFAND, Esq.
GEORGE STRICKLER, JR., Esq.
American Civil Liberties Union Foundation of Louisiana, Inc.
c/o Tulane Law School
New Orleans, Louisiana 70118
(504) 866-2751

R. JAMES KELLOGG, Esq.
Howell, Kellogg & Bayer
806 Perdido Street, Suite 401
New Orleans, Louisiana 70112
(504) 566-0336

Attorneys for Appellees

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-6565

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16(1) of the Rules of the Supreme Court of the

United States, move that the judgment of the Court of Appeals for the Fifth Circuit be affirmed on the grounds that the Court of Appeals' decision closely follows an unbroken line of authority and that the questions presented by Appellants are so unsubstantial as to need no further argument.

STATEMENT OF THE CASE

Appellees adopt the statement given at the beginning of the Court of Appeals' opinion, 617 F.2d 70, 71-72 (5th Cir. 1980), which states the facts somewhat more comprehensively than Appellants do in their Jurisdictional Statement.

REASONS TO AFFIRM

I. THE COURT OF APPEALS CORRECTLY RULED THAT A LOCAL ORDINANCE VIOLATED THE COMMERCE CLAUSE BY REQUIRING ALL EMPLOYERS TO HIRE ONLY THOSE EMPLOYEES WHO FIRST OBTAIN A "WORKER'S IDENTITY CARD," PAY A $10.00 FEE, SUBMIT TO FINGERPRINTING, AND DISCLOSE VAST QUANTITIES OF PERSONAL INFORMATION.

The St. Mary Parish Worker's Identity System directly burdens and channels the interstate flow of labor by erecting totally unnecessary registration and fee barriers between willing workers and willing employers attempting to enter into a private employment relationship. In the discussion of their first question, Appellants press the novel argument that this scheme "simply does not implicate the commerce clause, as it does not affect 'commerce'." Jurisdictional Statement [J.S.], at 8. Nearly 40 years ago, however, this Court

already considered it "settled beyond question that the transportation of persons is 'commerce'." Edwards v. California, 314 U.S. 160, 172 (1941). Edwards invalidated a law aimed at preventing the migration of indigent persons into California during the Depression. In words that apply equally to the instant case, the Edwards Court concluded that the Commerce Clause forbids "any single State to isolate itself from difficulties common to all," such as social problems and crime, "by restraining the transportation of persons and property across its borders." Id. at 173.

Since Edwards, this Court has consistently ruled that the Commerce Clause encompasses not only the free movement of goods and animals, but also the interstate flow of human beings.

See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256-257 (1964); Morgan v. Virginia, 328 U.S. 373 (1946).[1] Any lingering doubt that the Commerce Clause might not protect out-of-state workers (as well as products) against state discrimination was surely laid to rest by Lewis v. BT Investment Managers, Inc., 100 S. Ct. 2009 (1980). In Lewis, the Court ruled unanimously that the Commerce Clause was violated by a Florida law which

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1. These cases also extend the protection of the Commerce Clause to the interstate migrants and passengers themselves, and not, as Appellants suggest, only to the transportation process. "It is immaterial whether or not the transportation is commercial in character." Edwards v. California, supra, at 172 n.1. See Heart of Atlanta Motel, Inc. v. United States, supra, at 256-57, and sources cited therein.

discriminated against out-of-state investment advisory services--a form of interstate human commerce. This line of cases from Edwards through Lewis makes it clear that the Commerce Clause prohibits state and local government interference with attempts to migrate in search of employment.[2]

In the instant case, St. Mary Parish Ordinance No. 837 (passed pursuant to 33 La. Rev. Stat. Sec. 1236(41) (West Supp. 1980)) obstructs a free-flowing labor supply and penalizes interstate movement, by requiring every person who enters the Parish in search of employment and every person who changes jobs to obtain a

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2. Labor conditions have long been considered a subject of commerce. See United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

worker's identity card. These outsiders must be fingerprinted and photographed, reveal personal information, and pay a $10.00 fee. Any employer, public or private, who hires an employee without an identity card is subject to fine or imprisonment or both.[3] Not surprisingly, a large number of potential workers are forced to seek jobs in other states and parishes because they object to the unnecessary disclosure of private information and/or are unable to pay the fee. Record at 33-35, 343,353-55;

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3. This is similar to Edwards, in which it was the brother-in-law who brought the migrant to California, not the migrant himself, who was prosecuted. Yet in both cases, interstate migration was restricted by the law.

Plaintiffs' Exhibits [Pl. Ex.] O-Q, Record at 329-31.[4] Under the system, Appellee employers face difficulty in hiring sufficient employees.[5] Even if they are able to find employees who do not object to the intrusive questionnaires, the employers still must bear the substantial financial burden of paying the $10.00 fee for each

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4. Appellants requested in their Notice of Appeal that the Record and all exhibits in the case be transmitted to this Court. J.S. at A-53.

5. Unlike many other parts of the country, oil-rich St. Mary Parish is actually facing a labor shortage, so it must draw upon an interstate labor pool. See 617 F.2d at 71; Record at 30, 418, 423-24.

job applicant who cannot afford it.[6] The

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6. See 617 F.2d at 76. Increased cost of doing business can be a factor in establishing a Commerce Clause violation. See Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 445 (1978); Pike v. Bruce Chruch, Inc., 397 U.S. 137 (1970).

Appellants cannot justify this increased business cost on the basis of Department of Revenue v. Association of Washington Stevedore Cos., 435 U.S. 734 (1978), which upheld a general business gross receipts tax as applied to stevedoring companies. In the first place, Appellants have never claimed that their Worker's Identity System is a revenue-raising device or that the $10.00 fee is a tax. Indeed, they have stipulated that the registration fees "are kept by the franchisees [private persons who collect them]. None are paid to the Parish or Police Jury." Pre-trial Stip. 5(k), Record at 141. Even assuming arguendo that Appellants could now retract their stipulation that the system was devised for crime control rather than revenue-raising (Pre-trial Stip. 5(e), Record at 141), the Worker's Identity System would fail miserably under the test articulated in Department of Revenue. The Court there noted that it had only upheld those "taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State." 435 U.S. at 750. (footnote cont'd)

Court of Appeals correctly found that this scheme unconstitutionally interferes with the free flow of labor, thereby causing injury to both employers and employees.[7] Indeed, the Commerce Clause

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(footnote 6 cont'd)
The $10.00 fee for each new worker under the St. Mary scheme does discriminate against interstate commerce, because it is imposed only on outsiders, and this fee is totally unrelated to services provided by the Parish, since neither the jobless registrants nor the employers who must pay it receive any benefit at all. See Deposition of Parish Identification Officer, at 4, Pl. Ex. F, Record at 328-29. Moreover, the $10.00 fee is clearly not a general tax of the type considered in Department of Revenue.

7. The Court of Appeals acted properly in reexamining the legal question of discrimination against commerce and weighing for itself the relative burdens and benefits imposed by the scheme. This Court has repeatedly found Commerce Clause violations and reversed trial court decisions for precisely these reasons. See, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1979); Raymond Motor Transportation, Inc. v. Rice, supra; Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976).

was designed for the very purpose of preventing the economic isolation and Balkanization which would be created were other localities to adopt a comparable worker's identity and registration system.[8] As Justice Jackson noted:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free

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8. The Court of Appeals was generous to Appellants by not including in its calculations the cumulative effects imposed on interstate commerce if other parishes and counties retaliated by adopting a comparable scheme. See Raymond Motor Transportation, Inc. v. Rice, supra; Katzenbach v. McClung, 379 U.S. 294 (1964); Bibb v. Navajo Freight, supra; Edwards v. California, supra. If other local governments imposed a $10.00 registration fee upon workers from outside their boundaries, it would create an inordinate cumulative burden both for migrant farmworkers with average annual incomes of $4,000, Record at 343-44, and for multistate and multinational corporations, such as oil and chemical companies, which must hire large numbers of employees in St. Mary Parish and throughout the nation.

> access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 539 (1949). See also Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) ("The Constitution was framed under the dominion of a political philosophy less parochial in range.")

II. THE UNANIMOUS COURT OF APPEALS RULING WAS CONCLUSIVELY MANDATED BY THE WELL-ESTABLISHED COMMERCE CLAUSE JURISPRUDENCE OF THIS COURT.

The carefully reasoned opinion of the Court of Appeals for the Fifth Circuit followed closely the compelling precedents of this Court. There is, moreover, no reason to reconsider these

underlying precedents, which were recently decided by clear, strong majorities of this Court. See e.g., Hughes v. Oklahoma, 441 U.S. 322 (1979) (7-man majority, 2 in dissent); City of Philadephia v. New Jersey, 437 U.S. 617 (1978) (7-2); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) (4 concurring in the opinion of the Court, none dissenting); Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977) (unanimous vote by the 8 participating Justices); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) (unanimous vote by the 8 participating Justices); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)

(same).[9]

The three-pronged test developed in these cases requires a court to inquire--as the Fifth Circuit did--whether the challenged law discriminates against interstate commerce, what local benefits it actually provides, and whether non-discriminatory alternatives are available. The Fifth Circuit correctly concluded that Ordinance No. 837 discriminates by severely limiting access to the local labor market. It is undisputed that the scheme operates to restrict the desirable

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9. The other cases relied on by the Fifth Circuit were all older, well-established precedents. See Dean Milk Co. v. Madison, 340 U.S. 349 (1951); H.P. Hood & Sons, Inc. v. DuMond, supra; Toomer v. Witsell, 334 U.S. 385 (1948); Edwards v. California, supra; Baldwin v. G.A.F. Seelig, Inc., supra; Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

St. Mary Parish labor market solely to residents of the Parish who are already employed there or who seek their first job there. Anyone else wishing to obtain a public or private job in St. Mary Parish must be willing both to pay a $10.00 penalty fee and to reveal personal information to an instrusive system[10] which is totally lacking in confidentiality safeguards.[11]

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10. The questionnaire employed by the Worker's Identity System requires a potential employee to reveal his or her race, sex, social security number, addresses for the last five years, names and addresses of relatives (father, mother, brothers, and sisters) spouse's address, driver's license number, and voter registration. For a copy of the questionnaire, see Record at 292 or J.S. at A-50, A-51.

11. There was undisputed testimony at trial that potential workers would refuse employment in St. Mary Parish rather than answer the questionnaire, which forced them to reveal personal information about themselves or their families--former residence in a mental institution or (footnote cont'd)

Unlike the market in abandoned cars, considered in Hughes v. Alexanderia Scrap, 426 U.S. 794 (1976), or in cement sales, considered in Reeves, Inc. v. Stake, 100 S. Ct. 2271 (1980), the St. Mary Parish labor market is neither created nor maintained by the State or the Parish. It is largely a private market in which private businesses, such as Appellee Service Machine & Ship-building, seek to hire workers from other states and nations, such as Appellee

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(footnote 11 cont'd)
prison, illegitimacy, cohabitation, and race. Record at 33-35, 340, 343, 353-55; Pl. Exs. O-Q., Record at 329-31. The system is particularly intimidating to sugar plantation workers seeking jobs for the first time in the industrial sector. Record at 300, 353-55. See 617 F.2d at 76. Moreover, neither the private franchisees who collect the information nor the Identity Officer who stores it have any qualifications or training in maintaining confidentiality. Pre-Trial Stips. 5(i), 5(n), Record at 141-42; Pl. Ex. F, at 2, 4, Record at 328-29.

Reubin and John Doe 1 (Pl. Ex. O; Record at 33-35, 328-29). Even Appellants concede that employers in the Parish are "penalized in relation to other competitors." J.S. at 14. Ordinance No. 837 is, therefore, just like the legislation invalidated by this Court in City of Philadelphia v. New Jersey, supra, which restricted the ability of private, in-state landfill operators to conduct business with out-of-state waste producers. See also Pike v. Bruce Church Inc., supra.[12]

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12. As Philadelphia and Pike demonstrate, Appellants are incorrect in their assertion that the Commerce Clause does not apply to burdens placed upon in-state businesses. The ordinance challenged here discriminates against both in-state employers and out-of-state employees--the two groups represented by Appellees.

Defendants-Appellants attempt to justify their discriminatory scheme before this Court just as they did in both courts below--by ritualistically repeating that Ordinance No. 837 was originally designed to prevent and deter crime. But "simply invoking the convenient apologetics of the police power," Kansas City Southern Railway v. Kaw Valley Drainage District, 233 U.S. 75, 79 (1914), is an inadequate defense to a Commerce Clause claim. This Court has repeatedly invalidated laws based on state and local interests every bit as important as crime control. Indeed, recent decisions have insisted that once discrimination against interstate commerce is shown, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of

nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt v. Washington Apple Advertising Commission, supra, at 353 (consumer protection law found unnecessarily burdensome and too tenuously related to avowed purpose). See Hughes v. Oklahoma, supra, at 336 (rejecting conservation of wildlife as justification in light of less burdensome alternatives); Raymond Motor Transportation, Inc. v. Rice, supra, at 444-45 (finding highway safety an inadequate justification); Great Atlantic & Pacific Tea Co. v. Cottrell, supra, at 372-73 (rejecting public health and safety justifications). See also City of Philadelphia v. New Jersey, supra (invalidating law based on enviromental protection and public health); Toomer v. Witsell, 334 U.S. 385, 403-04 (1948)

(finding protection of local industry and of employment inadequate justifications).

Appellants' total inability to shoulder either portion of this burden is well described in the following passage from the Court of Appeals' opinion:

> The parish's claim that the ordinance will facilitate the detection and deterrence of crime is greatly undermined by the testimony of the parish's own fingerprint expert, who testified that most of the information obtained through the registration system was of no use to him, and that he had never received any information from the registrations. Plaintiff's Exh. G (Deposition of J. Garlotte at 4-5)....The burdens on interstate commerce are indeed weighty in relation to what some parish law enforcement officials conceded were the registration system's somewhat illusory benefits.

617 F.2d at 74-75, 76. The Court of Appeals further noted that the parish had

> made no showing of the unavailability of nondiscriminatory alternatives that would serve to protect the local

> interests in question. The testimony of one expert at trial indicated that persons between fifteen and nineteen commit a disproportionately large percentage of the crime. Record, vol. II, at 361. But under the ordinance's discriminatory registration scheme, local individuals that would most likely fall into this category would not be required to register, since many would be seeking their first jobs. It would appear that a nondiscriminatory registration scheme would better serve crime prevention and detection in the parish.

Id. at 75 (emphasis in original).

The record thus reveals obvious, substantial burdens upon interstate commerce and defendants' complete failure to prove actual local benefit or lack of less burdensome alternatives. This record has been reviewed by two unanimous Fifth Circuit panels, under the test articulated by the well-established precedents of this Court. There is, moreover, no conflict among the circuits.

Under these circumstances, nothing further would be gained by plenary review of the appeal by this Court.

III. ADDITIONAL SUBSTANTIAL CONSTITUTIONAL GROUNDS SUPPORT THE COURT OF APPEALS' DECISION.

Besides running afoul of the Commerce Clause, the statute and ordinance challenged here violate Plaintiffs-Appellees' rights of privacy, work, travel, due process, and equal protection. Given the obvious Commerce Clause violation, the Court of Appeals found it unnecessary to consider these other substantial constitutional claims. See 617 F.2d at 72. Should this Court disagree with the Fifth Circuit's careful analysis of the Commerce Clause claim, it would then become necessary for this

Court, or the Fifth Circuit, to rule upon these properly preserved and substantial constitutional claims. Thus, summary reversal would certainly be an inapproriate disposition of this case.

Even Appellants agree that the other claims would have to be considered. J. S., Question 2. They are, however, mistaken in believing that a lower level of judicial scrutiny would be required than was employed in the Commerce Clause context. In fact, since Ordinance No. 837 violates an constellation of fundamental constitutional rights, close judicial scrutiny would be essential.

Much of our strength as a free society rests upon a tripod composed of three fundamental rights--the right to work, the right to travel for the purpose of relocating, and the right of privacy. In cases implicating even one of these

interrelated rights, this Court has repeatedly insisted that the appropriate legal standard is strict scrutiny or, at the very least, intermediate scrutiny. See, e.g., Truax v. Raich, 239 U.S. 33 (1915) (fundamental right to work for a living); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (fundamental right to travel for the purpose of relocating); Whalen v. Roe, 429 U.S. 589 (1977) (right to informational privacy). See also Delaware v. Prouse, 440 U.S. 648 (1979) (Fourth Amendment protection against unreasonable police identity check); Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (Wisdom, J.) (right to informational privacy), cert. denied, 439 U.S. 1129 (1979). The St. Mary Parish Worker's Identity System infringes upon each of these precious constitutional rights. It does so by

placing potential employees between the Scylla of being unable to obtain work in the Parish and the Charybdis of revealing personal information to a system totally lacking in safeguards against dissemination.

Were this Court, or any reviewing court, to examine the asserted purposes of this bizarre system in light of the evidence presented at trial, it would conclude that these purposes were not legitimate,[13] let alone compelling

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13. The goal of reducing "the rate of crime by deterring suspects who are wanted in other jurisdictions from moving into the Parish to work," Pre-trial Stip. 5(e), Record at 140-41, flies in the face of the numerous cases ruling that a state or locality may not isolate itself by screening out problems which will thereby be channeled into other states. See City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (Commerce Clause forbids keeping out garbage brought from adjoining states); Hicklin v. Orbeck, 437 U.S. 518 (1978) (Privileges and Immunities Clause forbids screening out (footnote cont'd)

state interests and that there was no rational, let alone substantial, relationship between these ends and the means chosen to effectuate them. Moreover, as noted above, the means chosen are certainly not the least restrictive ones.

(footnote 13 cont'd)
employees who compete with local laborers); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel and Equal Protection violated by law limiting migration of welfare recipients); Edwards v. California, 314 U.S. 160 (1941) (right to travel and Commerce Clause violated by law attempting to screen out poor persons). This is an especially questionable goal to assert as the justification for a system that has the pratical effect of deterring honest persons seeking to earn a living while having little or no effect upon criminal activity. See Pl. Ex. H, at 6-8, 10; Record at 328-29, 359.

CONCLUSION

Following the clear dictates of this Court, the Court of Appeals for the Fifth Circuit correctly ruled that the St. Mary Parish Worker's Identity System violates the Commerce Clause. This unanimous ruling is not in conflict with the Commerce Clause decisions of any other court in the country. Indeed, the only aberrant opinion in this area of the law is that rendered by the trial court in the instant case, which gave short shrift to the Commerce Clause claim. 466 F. Supp. at 1208. That unprecedented opinion is, in fact, the only one which has ever validated a far-ranging identity system requiring the mass governmental questioning and fingerprinting of every new worker in <u>every</u> type of job throughout an entire geographic area.

That unfortunate error of law has now been corrected, first by the Fifth Circuit panel (Judges Clark, Gee, and Hill) which granted an injunction pending appeal and, more completely, by Judge Tjoflat's detailed opinion for another unanimous panel. 617 F.2d 70. This ruling accurately reflects both the clear Commerce Clause precedents of this Court and a proper balancing of the relevant policy considerations. For these reasons, Appellees urge this Court to affirm summarily.

Respectfully submitted,

M. DAVID GELFAND
GEORGE STRICKLER, JR.
American Civil Liberties Union Foundation Of Louisiana, Inc.
c/o Tulane Law School
New Orleans, LA 70118
(504) 866-2751

R. JAMES KELLOGG,
Howell, Kellogg & Bayer

806 Perdido St.
Suite 401
New Orleans, LA 70112
(504) 566-0336

ANDREW REED, ESQ., Of
Counsel
Aycock, Horne, Caldwell,
Coleman & Duncan
Box 1700
Morgan City, LA 70380
(504) 384-4523

The assistance provided by Tom Gooding and Michael Magner is gratefully acknowledged.

CERTIFICATE OF SERVICE

I certify this _____ day of September, 1980, that I have served three copies of the foregoing Motion to Affirm upon Bernard E. Boudreaux, Jr., Bauer, Darnell, McNulty & Boudreaux, Post Office Box 565, Franklin, LA. 70538; Anthony J.

Guarisco, Jr. and Michael Aloise, Jr., 500 Roderick Street, Suite 26, Post Office Box 2727, Morgan City, LA. 70380; and Edward M. Leonard, Jr., Post Office Box 2779, Morgan City, LA. 70381, Attorneys for Appellants, by mailing same, postage prepaid addressed to them at their offices. I have also sent a copy to J. Marvin Montgomery, Jr., Esq., Assistant Attorney General, Post Office Box 44005, Baton Rouge, LA. 70804.